No. 88-2109

In The

Supreme Court of the United States

October Term, 1989

THE STATES OF KANSAS AND MISSOURI,
As Parens Patriae,

Petitioners,

vs.

THE KANSAS POWER AND LIGHT COMPANY
and UTILICORP UNITED INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Petitioners' statement of "Questions Presented" violates Supreme Court Rule 21.1(a) by presenting argumentative and repetitious questions. The question certified by the District Court for interlocutory appellate review, decided by the United States Court of Appeals for the Tenth Circuit pursuant to 28 U.S.C. § 1292(b), and presented to this Court asks:

> In a private antitrust action under 15 U.S.C. § 15 involving claims of price fixing against the producers of natural gas, is a State a proper plaintiff as *parens patriae* for its citizens who paid inflated prices for natural gas, when the lawsuit already includes as plaintiffs those public utilities who paid the inflated prices upon direct purchase from the producers and who subsequently passed on most or all of the price increase to the citizens of the State?

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents The Kansas Power and Light Company[1] and UtiliCorp United Inc.[2] respectfully request that this

[1] In compliance with Supreme Court Rule 28.1, The Kansas Power and Light Company states that it has two wholly-owned subsidiaries, Rangeline Corporation and Gas Service Energy Corporation, and that it acquired the former Gas Service Company in 1983.

[2] In compliance with Supreme Court Rule 28.1, UtiliCorp United Inc. states that it is a publicly-held electric and natural gas utility operating in seven states through five divisions and in one Canadian province through a wholly-owned subsidiary. In addition to these utility operations, UtiliCorp has three other wholly-owned subsidiaries.

Court deny the petition for writ of certiorari, seeking review of the opinion of the United States Court of Appeals for the Tenth Circuit in this case.

STATEMENT OF THE CASE

A. Background

The Kansas Power and Light Company ("KPL") is both an industrial natural gas consumer and a natural gas distribution company which serves residential, commercial, and industrial customers in the states of Kansas, Missouri, Oklahoma, and Nebraska. UtiliCorp United Inc. ("UtiliCorp") provides natural gas to industrial, commercial, and residential customers in western Missouri and Lawrence, Kansas, through its Missouri Public Service and Kansas Public Service divisions.

KPL and UtiliCorp (also referred to herein as "the utilities") purchased natural gas directly from Williams Natural Gas Company ("Pipeline"). Pipeline had purchased that gas from Amoco Production Company ("Amoco"), Cities Service Oil & Gas Corporation ("Cities Service"), CSG Exploration Company ("Exploration"), the Moxa Limited Partnership ("Moxa"), and the Wamsutter Limited Partnership ("Wamsutter").

In September of 1984, KPL filed a complaint pursuant to Section 4 of the Clayton Act, 15 U.S.C. § 15(a) (1982), against defendants Pipeline, Amoco, Cities Service, Exploration, Moxa, and Wamsutter. KPL alleges, *inter alia*, that the defendants, acting in combination, artificially

inflated and fixed the price of natural gas that was produced by them in Wyoming and sold in interstate commerce by Pipeline to KPL, UtiliCorp, and other direct natural gas purchasers. UtiliCorp subsequently intervened and filed a substantially similar complaint against the same defendants.

KPL and UtiliCorp seek to recover overcharge damages for all natural gas purchased directly from the defendants which was used by the utilities in their own operations or was resold to their residential, industrial, and commercial customers. KPL and UtiliCorp also seek to recover resale profits lost as a result of defendants' anticompetitive conduct. The defendants claimed as an affirmative defense that the utilities passed on any illegal overcharges to their customers and therefore lacked standing under Section 4 of the Clayton Act.

Following KPL's lead, the states of Kansas and Missouri ("the States") filed complaints under Section 4 of the Clayton Act against the same defendants in July of 1985 and August of 1986, respectively. The States' complaints are nearly identical to KPL's complaint and the subsequent complaint of UtiliCorp. The States seek to recover overcharge damages on behalf of state agencies and municipalities[3] that purchased gas directly or

[3] The States' claims on behalf of cities which distribute natural gas to their residents through a municipal utility are entirely analogous to the claims of KPL and UtiliCorp. For example, the City of Springfield, Missouri, is a named plaintiff with claims on behalf of all its customers, including industrial and commercial purchasers.

indirectly from Pipeline and as *parens patriae* on behalf of indirect residential gas customers in their respective states.

The States do not – and indeed cannot – assert claims on behalf of the utilities' industrial and commercial gas customers in Kansas and Missouri, or on behalf of KPL's residential, industrial, and commercial gas customers in Nebraska and Oklahoma. As a result, the States' *parens patriae* claims represent no more than 50% of the natural gas sold by the defendants in Missouri and Kansas. Recognition of the States' *parens patriae* claims, and the defendants' corresponding pass-on defenses, would therefore eliminate more than 50% of the antitrust damages asserted by the utilities in this case against the defendant producers and suppliers.

B. Proceedings Below

KPL and UtiliCorp filed motions to strike or for partial summary judgment on those affirmative defenses that were based on the pass-on theory rejected in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968). The District Court found on uncontested evidence that neither KPL nor UtiliCorp resold natural gas pursuant to cost-plus contracts for fixed quantities. *In re Wyoming Tight Sands Antitrust Cases*, 695 F. Supp. 1104 (D. Kan. 1988), *aff'd*, 866 F.2d 1286 (10th Cir. 1989); Appendix to States' Petition for Writ of Certiorari at 34 ("A34"). Accordingly, it entered partial summary judgment prohibiting defendants from asserting pass-on defenses to the utilities' antitrust claims. A37.

The District Court also dismissed *sua sponte* the States' *parens patriae* claims pursuant to the holding of *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), prohibiting offensive use of pass-on theories. In so ruling, the District Court made no determination regarding the amount of illegal overcharges allegedly passed on by KPL or UtiliCorp to their customers. A34.

None of the defendants appealed from the District Court's entry of partial summary judgment prohibiting use of pass-on defenses. The States were granted an interlocutory appeal solely to determine whether residential indirect purchasers of natural gas may join their own local distribution companies in asserting federal antitrust claims against the producers and an intermediary pipeline supplier of natural gas.

The Tenth Circuit properly concluded that the rulings and rationales underlying *Hanover Shoe* and *Illinois Brick* prohibit the needless and expensive complication of ongoing federal antitrust litigation which the States' *parens patriae* claims would cause. *In re Wyoming Tight Sands Antitrust Cases*, 866 F.2d 1286, 1292 (10th Cir. 1989); A12. Affirming the District Court's Order, the Court below distinguished the decision of the Court of Appeals for the Seventh Circuit in *State of Illinois ex rel. Hartigan v. Panhandle Eastern Pipe Line Co.*, 852 F.2d 891 (7th Cir.) (en banc), *cert. denied*, 109 S. Ct. 543, 102 L. Ed. 2d 573 (1988) (*"Panhandle Eastern"*). A13-14.

The Tenth Circuit observed that *Panhandle Eastern* was based on numerous facts neither established nor

present in this case.[4] A13. In particular, the Tenth Circuit stressed that the Seventh Circuit in Panhandle Eastern was faced with the residential consumers of a single utility, while the plaintiffs in this case include "utilities that occupy different levels on the distribution chain within two states, and . . . two states and their attendant public utility rate regulation schemes."[5] A13.

The States' petition raises the question of whether KPL and UtiliCorp, as direct purchasers from an anticompetitive combination, should be permitted to proceed under Section 4 of the Clayton Act on behalf of themselves and for the benefit of their industrial, commercial, and residential customers without further delay, additional expense, and unnecessary complication. That question can and should be resolved by denying the States' petition.

REASONS FOR DENYING THE WRIT

The States' petition should be denied for three reasons:

First, the Tenth Circuit's decision in this case faithfully follows the Court's rulings in *Hanover Shoe* and

[4] The Seventh Circuit itself had conceded earlier that the District Court's findings in *Wyoming Tight Sands* were distinguishable. A14, *citing Panhandle Eastern*, 852 F.2d at 893.

[5] Moreover, as a "one city" utility until 1986, UtiliCorp's Kansas Public Service operation was not subject to the authority of the Kansas Corporation Commission until 1987 and did not resell natural gas by way of a Purchased Gas Adjustment mechanism until that time.

Illinois Brick. The States' petition is thus a direct challenge to the sensible *Illinois Brick* rule. This Court should decline the States' invitation to reinstate the process of individual market classification rejected in *Illinois Brick*.

Second, this Court in *California v. ARC America Corp.*, 490 U.S. ___, 109 S. Ct. 1661, 104 L. Ed. 2d 86 (1989)("*ARC America*"), reaffirmed the direct purchaser rule of *Illinois Brick* for federal antitrust claims, but expressly permitted state attorneys general to assert claims on behalf of indirect residential purchasers pursuant to state antitrust law. No need exists to reexamine the *Illinois Brick* rule.

Third, significant factual differences explain conclusions reached by the Tenth Circuit in this case and the Seventh Circuit in *Panhandle Eastern*. Certiorari should be denied because no fundamental conflict currently exists between those Circuits regarding the policies and purposes underlying *Hanover Shoe* and *Illinois Brick*.

I. Certiorari Should Be Denied Because The Tenth Circuit's Decision Is Totally Consistent With This Court's Rulings In *Hanover Shoe* And *Illinois Brick*.

In *Illinois Brick*, this Court recognized that "the process of classifying various market situations according to the amount of pass-on likely to be involved and its susceptibility of proof in a judicial forum would entail the very problems that the *Hanover Shoe* rule was meant to avoid." *Illinois Brick*, 431 U.S. at 744-45. The Court further noted that "*Hanover Shoe* itself implicitly discouraged the creation of exceptions to its rule barring pass-on defenses" and adhered to the narrow scope of exemption indicated in that decision. *Id.* at 745.

Because the Court of Appeals closely followed the rulings and rationales of *Hanover Shoe* and *Illinois Brick*, the States unfairly brand the Tenth Circuit's opinion as mechanical. Petition at 7. On the contrary, the Court below applied *Hanover Shoe* and *Illinois Brick* carefully and correctly to avoid the addition of unnecessary complexity and expense to this case and to ensure the efficient enforcement of federal antitrust law in the future. *See* A9-13.

In particular, the Tenth Circuit noted that "[c]omplex issues of proof will grow geometrically if the States press their consumers' demands," due in part to the unresolved factual issue of how much illegal overcharge was passed on to the residential consumers of each utility. A10. Contrary to the States' promise of simple damage apportionment, the Court below recognized that "[a]ny allocation of illegal overcharges to the residential consumers may require tracing the sale from the wellhead through each level of distribution in order to establish the amount of illegal gas costs actually paid by the consumers in each state. . . ." A12. The Tenth Circuit also correctly observed that even a perfect pass-on of all overcharges would not eliminate the need to apportion the damages sustained by KPL and UtiliCorp as a result of decreased demand caused by defendants' inflated prices. A12-13.

Finally, the Court of Appeals noted that permitting the States to pursue their claims in this case would imperil vigorous enforcement of the antitrust laws in the future. A10, 11. Such action would shift the incentive to prosecute alleged antitrust violators away from the direct purchaser, who is closer to the violator and presumably has better knowledge, and transfer the cost of policing and enforcing the antitrust

laws to the states. A10, 14. The Tenth Circuit recognized that the States' incentive to join in this particular action provides no assurance whatsoever of aggressive antitrust enforcement in other cases.[6] A10, 11.

The States fail to address these critical issues in their petition. Instead, they seek certiorari by assuming a perfect pass-on of all overcharges and claiming that such damages are "readily-identifiable" and "easily-proven." Such assumptions neither require nor justify a reexamination of *Hanover Shoe* and *Illinois Brick*. The States' petition prays for nothing more than a prohibited individual market classification and therefore should be denied.

II. Certiorari Should Be Denied Because This Court Fully Defined The Cost-Plus Exception to the Direct Purchaser Rule In *Illinois Brick* and Permitted a State Law Remedy For Indirect Purchasers in *ARC America*.

The States contend that certiorari is necessary because the Court never has "addressed or explained" the "precise nature and scope" of the cost-plus exception to the *Illinois Brick* direct purchaser rule. Petition at 10-11. The States' contention is incorrect.[7]

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[6] This Court is well aware of the extraordinary expenses required to prepare competently a complicated antitrust case. KPL – as the direct purchaser of 80 percent of the gas at issue in this case – has taken the lead and paid the vast majority of expenses. The States' desire to join and remain in this action with KPL and UtiliCorp is directly related to their ability to share expenses with the utilities. Far less certain is the States' incentive or ability to bring an action independently in the future if the *Illinois Brick* rule is changed.

[7] The *Illinois Brick* rule and its narrow exceptions are well understood and routinely enforced by the lower courts. The

(Continued on following page)

The Court originally indicated that the cost-plus contract exception might be applicable when the direct purchaser "has not been damaged." *Hanover Shoe*, 392 U.S. at 494. The Court specifically recognized, however, that direct purchasers would incur recoverable damages if total sales declined as a result of illegal overcharges. *Id.* at 493.

In *Illinois Brick*, the Court explained that the cost-plus contract exception to the rule barring offensive and defensive use of pass-on theories applies only if "the purchaser is insulated from any decrease in its sales as a

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five cases cited by the States in their petition at 11 n.9 do not establish that lower courts are confused and in conflict regarding proper application of the *Illinois Brick* rule. Three of the cited cases properly rejected a regulated rate exception. *See U.S. Oil Co. v. Koch Refining Co.*, 518 F. Supp. 957, 962-63 (E.D. Wis. 1981); *Go-Tane Service Stations, Inc. v. Ashland Oil, Inc.*, 508 F. Supp. 200 (N.D. Ill. 1981); *City of Cleveland v. Cleveland Elec. Illuminating Co.*, 538 F. Supp. 1320, 1323-24 (N.D. Ohio 1980).

The residential customers in the fourth case, like KPL and UtiliCorp in this case, constituted the first direct purchasers from the conspiring defendants. *See In re New Mexico Natural Gas Antitrust Litigation*, 1982-1 Trade Cases (CCH) ¶ 64, 685 (D.N.M. 1982). The holding in that case, therefore, is consistent with the direct purchaser rule. The final case cited, *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148 (5th Cir.), *cert. denied*, 449 U.S. 905 (1980), is also inapplicable because the "functional equivalent" test set forth therein requires "precisely the analysis that the Court disparaged in *Illinois Brick*." *Panhandle Eastern*, 852 F.2d at 894. *See also County of Oakland v. City of Detroit*, 866 F.2d 839 (6th Cir. 1989) (counties are proper parties to assert antitrust claims despite pass-on of excessive costs).

result of attempting to pass on the overcharge, because its customer is committed to buying a fixed quantity regardless of price." *Illinois Brick*, 431 U.S. at 736. Certiorari should be denied precisely because such facts are not present in this case.

In *ARC America*, this Court recently reaffirmed the direct purchaser rule, stating flatly that "[a]s construed in *Illinois Brick*, § 4 of the Clayton Act authorizes only direct purchasers to recover monopoly overcharges under federal law." 109 S. Ct. at 1666; 104 L. Ed. 2d at 96. Nevertheless, the Court also held that state attorneys general are free to pursue claims on behalf of indirect residential purchasers by initiating *parens patriae* actions under state antitrust law. *Id.* No need now exists to multiply the complexity and expense of this action simply to revisit a rule reaffirmed in April of this year. Accordingly, the States' petition for writ of certiorari should be denied.

III. Certiorari Should Be Denied Because No Fundamental Conflict Currently Exists Between The Tenth And Seventh Circuits Regarding The Policies And Purposes Underlying *Hanover Shoe* and *Illinois Brick*.

The Tenth Circuit specifically noted the following critical differences between the facts in this case and the facts underlying the Seventh Circuit's decision in *Panhandle Eastern*:

1. Unlike this action, which was initiated by KPL in 1984, the plaintiff utility in *Panhandle Eastern* had delayed filing suit, and a serious question existed as to whether the statute of limitations had expired on the utility's claim. A13;

2. The Court in *Panhandle Eastern* dealt with the customers of a single utility in a single state with a single set of rate regulations, while this action involves numerous utilities operating in at least two separate states with two rate regulation schemes. A13;

3. The Court in *Panhandle Eastern* was not required to sacrifice the overcharges passed on to the commercial and industrial customers of the utility, in stark contrast to the elimination of more than 50% of the damages claimed by the utilities that will occur in this case if the States' pass-on theories are permitted. A14;

4. No doubt existed in *Panhandle Eastern* that all overcharges were passed-on by the utility, and no need existed to apportion damages between the direct and indirect purchasers, while in this case the Tenth Circuit noted that "the amount of overcharge passed on may be an unresolved question of fact." A14.

Each of these facts was considered by the Seventh and Tenth Circuits in reaching their respective decisions.

Although the rulings in this case and in *Panhandle Eastern* differ, no conflict exists between the Tenth and Seventh Circuits regarding the policies and purposes underlying the *Hanover Shoe* and *Illinois Brick* rules. Both courts recognized the need to preserve incentives for effective and efficient enforcement of the federal antitrust laws. Under the facts of this case, the Tenth Circuit faithfully served those policies and accomplished that purpose by refusing to recognize a public utility exception to the direct purchaser rule of *Illinois Brick*. The Seventh Circuit in *Panhandle Eastern* felt compelled by the facts of that case to take different action to achieve the same end.

The Seventh Circuit candidly admitted in *Panhandle Eastern* that "we can never be absolutely certain that regulation has resulted in a 100 percent pass through. . . ." *Panhandle Eastern*, 852 F.2d at 898. The Seventh Circuit then explained that it ruled as it did because "the doubts here are too small to warrant our insisting that this potentially serious antitrust violation, which may have caused consumers of natural gas to pay almost $50 million in higher prices, shall go unremedied, as it may if we accept Panhandle's view of the scope of *Illinois Brick*." *Id.* The Seventh Circuit's result-oriented decision, whether correct or incorrect, does not evidence a fundamental conflict with the Tenth Circuit sufficient to require or justify granting certiorari in this case.

CONCLUSION

For the reasons set forth above, the petition of the states of Kansas and Missouri as *parens patriae* for a writ of certiorari should be denied.

Respectfully submitted,

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